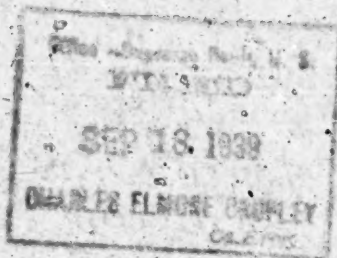




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SUPREME COURT, U.S.

No. 309

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**in the Supreme Court of the United States**

**OCTOBER TERM, 1939**

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**WILLIAM H. DANFORTH, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---



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## OPINIONS BELOW

The oral opinion of the District Court (R. 39-41) is not reported. The two opinions of the Circuit Court of Appeals (R. 221-229; 233-239) are reported in 102 F. (2d) 5, and 105 F. (2d) 318.

## JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered July 11, 1939 (R. 239-240). Petition for a writ of certiorari was filed August 23, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether in a suit brought by the United States to condemn a flowage easement, the condemnee may, in the absence of statutory consent, recover a judgment against the United States upon a contract, which, it is claimed, fixed the value of the easement.

2. Whether under the circumstances of the instant case there has yet been a taking by the Government of a flowage easement over petitioner's property, with a consequent obligation under the Fifth Amendment to pay interest from the date of the taking, as a part of just compensation, on the sum determined to be the value of the easement.

### STATUTE INVOLVED

The pertinent provisions of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (33 U. S. C. Secs. 702a-702m), are set out in the Appendix.

### STATEMENT

The United States instituted this proceeding to condemn a flowage easement over petitioner's land pursuant to the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C. Secs. 702a-m. That Act (section 1) adopted by reference the Jadwin plan for flood control in the Mississippi valley (H. Doc. No. 90, 70th Cong., 1st Sess. (1927)). That plan recommended, among other things, the creation of a floodway along the west side of the Mississippi River



between Birds Point and New Madrid, Missouri.<sup>1</sup> This was to be accomplished by constructing between those points a second or set-back levee several miles west of the existing riverside levee and by reducing the height of an eleven-mile portion of the riverside levee south of Birds Point from a grade equivalent to 58 feet on the Cairo gauge to one equivalent to 55 feet on that gauge. This reduced portion was to be known as the upper fuse-plug section, and provision was also made for a lower fuse-plug section in the portion of the riverside levee near New Madrid.

When the floodway is completed and the riverside levee is reduced the upper fuse-plug section will admit water from the Mississippi River when the flood stage exceeds 55 feet on the Cairo gauge. The set-back levee will confine this diverted water to the floodway territory and will direct it to the south, where it will return to the Mississippi at the lower fuse-plug section (R. 109-112). Petitioner's land (Tract No. 243) is situated in the floodway immediately east of the set-back levee<sup>2</sup> approximately halfway between Birds Point and New Madrid (R. 7).

Construction work on the set-back levee began on October 21, 1929, and was complete on October

<sup>1</sup> A map of the floodway and the land involved in this proceeding is attached to the inside back cover of this brief.

<sup>2</sup> No part of the set-back levee has been or is to be built on the land involved in this proceeding.



31, 1932, except that a gap where a railroad ran through the levee had not been closed. This gap was still open at the time of the trial (R. 195-196), but has since been closed. Since the necessary flowage easements have not been acquired, the riverside levee has been maintained at its original height of 58 feet, and the upper fuse plug, which is designed to admit water into the floodway, has not yet been created (R. 111).<sup>3</sup>

On January 14, 1932, the United States District Engineer wrote to petitioner offering him \$31,681.98 for a flowage easement over his land and stating (R. 69) "Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer." Petitioner accepted (R. 69, 171). Thereafter, on July 8, 1932, the District Engineer wrote petitioner stating that after careful consideration it had been determined that the price first suggested could not properly be

---

<sup>3</sup> In January 1937 the Mississippi River attained its highest flood stage in recorded history; if confined, the water would have reached 61½ or 62 feet on the Cairo gauge (R. 191). The pressure of the water opened natural crevasses in the riverside levee (R. 192-193) and thereafter officers of the United States Army artificially crevassed the upper fuse-plug section at three points (R. 201-202). The petitioner's land was flooded, as were all lands in the vicinity, but it is clear that it would have been flooded regardless of the floodway project and even if the levee had not been artificially crevassed (R. 190-191, 193). After the flood subsided the riverside levee, including the upper fuse-plug section, was restored to its previous height (R. 200).

recommended to the court, because it was in excess of what was fair and reasonable (R. 185-186).

On September 25, 1933, the Government instituted this condemnation proceeding in the United States District Court for the Eastern District of Missouri (R. 2-10). Petitioner filed an answer and a counterclaim asking the court for judgment against the United States in the sum of \$31,681.98 with interest (R. 21-25). On motion of the Government (R. 27-32) the answer and counterclaim were stricken (R. 39-41). Commissioners returned an award fixing just compensation at \$17,921.70 (R. 79) and on April 23, 1937, the District Court entered judgment that the United States will acquire the flowage easement prayed for in the petition when it pays that amount into the registry of the court (R. 78-79).

On appeal the Circuit Court of Appeals in its first opinion (R. 221-229) upheld the District Court in denying petitioner recovery on the contract, but held that a taking had occurred on October 21, 1929, when construction work on the setback levee was begun, and modified the judgment so as to include interest on the award from that date. The Government obtained a rehearing (R. 230-233) and, in its second opinion (R. 233-239), the court held that there has as yet been no taking of a flowage easement over petitioner's land. Accordingly, the judgment of the District Court was affirmed without modification (R. 239-240).

## ARGUMENT

1. The court below held (R. 221-228) that in a condemnation suit brought by the United States the condemnnee cannot, in the absence of statutory consent, recover a judgment against the United States upon a contract which, it is claimed, fixed the value of the easement. The decision is plainly correct and presents no conflict of decisions. The United States cannot be sued without its consent, either by direct suit or by counterclaim against it. *Nassau Smelting Works v. United States*, 266 U. S. 101, 106; *Illinois Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 504-505; *North Dakota-Montana W. G. Ass'n v. United States*, 66 F. (2d) 573, 577-578 (C. C. A. 8th), certiorari denied, 291 U. S. 672; *Owen v. United States*, 8 F. (2d) 992, 993 (C. C. A. 5th)..

Petitioner's claim is not within the \$10,000 jurisdictional limit of the Tucker Act (Judicial Code, Sec. 24 (20), 28 U. S. C., sec. 41 (20)),<sup>4</sup> and he does not contend that there is any Act of Congress giving the District Court jurisdiction. Instead petitioner relies (pp. 12-13, ~~16~~) upon a line of admiralty cases culminating in *United States v. The Thekla*, 266 U. S. 328, 339-340, which held that when a sovereign "comes into Court to assert a

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<sup>4</sup> The jurisdiction of the Court of Claims under the Tucker Act (Judicial Code, Sec. 145, 28 U. S. C., sec. 250 (1)) is not thus limited; clearly it would have had jurisdiction of petitioner's claim.

claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter," even to the extent of becoming subject to an affirmative judgment. In that case the Court expressly stated (p. 339) that it did not "qualify \* \* \* in any way" its decisions in *Nassau Smelting Works v. United States*, 266 U. S. 101, and *Illinois Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, *supra*.

In the case at bar the United States did not come into court "to assert a claim" and did not take "the position of a private suitor." It came into court as a sovereign exercising the right of eminent domain, and its action in doing so gives rise to no implication that it consented to anything other than that just compensation be determined. Only in admiralty, where the courts are constantly confronted with the necessity of determining in one action intricate problems of liability in prize and collision cases, has the doctrine of *The Thekla* been given the scope of permitting the recovery of an affirmative judgment against the United States. The cases cited by petitioner (pp. 12-13, 16, 25) which did not involve admiralty proceedings demonstrate that outside of that field the doctrine has been limited to allowing recoupments and set-offs not exceeding the amount of the Government's claim. These cases are distinguishable from the one at bar not only because a condemnation pro-

ceeding affords no basis for an implication that the Government has "laid aside its protective cloak of immunity from suit" (R. 227), but because the United States is making no claim against the petitioner to which a recoupment or set-off could apply.

*Wachovia Bank & Trust Co. v. United States*, 98 F. (2d) 609 (C. C. A. 4th), also relied upon by petitioner (pp. 13, 16, 26), is fully distinguished by the court below (R. 228): in addition to the factual and procedural differences in the two cases as there pointed out, the fact that the condemnee is bound by his prior contract in no sense means that the Government, condemning in the forum where it cannot be sued on the contract, is similarly bound.

2. The holding (R. 234-239) that there has as yet been no taking of a flowage easement over petitioner's land is clearly correct and entirely consistent with all applicable authorities. Since 1914 the riverside levee has been maintained at a height equivalent to 58 feet on the Cairo gauge (R. 189-190). The Jadwin Plan contemplates the reduction of a portion of this levee known as the upper fuse-plug section, to a height equivalent to 55 feet on that gauge. When this is done it will increase the frequency of overflow of lands within the floodway by admitting water when the Mississippi attains a stage of 55 feet instead of affording protection up to 58 feet. However, the



upper fuse-plug section has not yet been reduced and the riverside levee has not been altered (R. 111). While the major portion of the set-back levee had been constructed by October 31, 1932, the record shows that even the completed levee will not affect the frequency of flooding (R. 190).

Furthermore, the Flood Control Act in substance prohibits the reduction of the upper fuse-plug section or any other act which will subject lands in the floodway to more frequent overflow, until the floodway is completed. \* Section 1 of the Act provides:

\* \* \* That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the *west* side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with \* \* \* raising, strengthening, and enlarging the levees on the *east* side of the river. \* \* \* [Italics supplied.]

The sole flood protection which petitioner's land enjoyed was afforded by levees on the *west* side of the river.<sup>5</sup> Moreover, the completion of the floodway involves not only the construction of the set-back levee, which was not finished until after the trial, but the acquisition of flowage easements,

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<sup>5</sup> There are no levees on the east side of the river opposite the Birds Point-New Madrid floodway, so that no question as to the effect of a raising of such levees is presented.

which is still incomplete. Section 4 of the Act provides:

The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River \* \* \*

The legislative history of this provision is conclusive that it means that the floodway shall not be put in operation until after the United States has acquired flowage rights. See 69 Cong. Rec. 7000, 7104, 7105, 7106, 7108, 7111. See also *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.), appeal dismissed upon stipulation, 64 F. (2d) 1015 (C. C. A. 8th). The Court of Appeals properly regarded the provisions of these two sections as a "plain mandate" (R. 238), which entirely disposed of any contention that the Government is in a position to put the floodway into operation at this time. Nothing has been done to increase the possibility that petitioner's land might be flooded.

Certiorari has been granted (June 15, 1939, No. 72, Oct. Term, 1939) on petition of the Government in *Sponenbarger v. United States*, 101 F. (2d) 506 (C. C. A. 8th). Petitioner strives to show

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\* The court also recognized that in view of these sections no taking can be predicated upon the actions of army officers during the emergency in 1937 (note 3, *supra*) and did not find it necessary to consider the fact that the officers in question acted without authority from their superiors (R. 200). *Hooe v. United States*, 218 U. S. 322; *Hughes v. United States*, 230 U. S. 24.



(pp. 10-11, 26) that his rights may be affected by the decision of this Court in that case. He also urges (pp. 10, 21-23) that the decisions in the two cases, both by the Eighth Circuit, are in conflict. In its opinion in the present case (R. 238-239) that court clearly distinguished the two cases. The *Sponenbarger* case involved land in a different floodway—the Boeuf floodway—and, as the court viewed the facts, an operative fuse plug had been created by retaining a large part of the riverside levee at its 1914 grade and by raising adjacent portions to the north and south as well as the levee on the opposite (east) bank. The court believed that the higher levee would divert water over the un-raised (fuse plug) levee and said (p. 512) that the “floodway stands ready to carry off the excess waters of major floods in accordance with the provisions of [the] legislation.” Nothing of this sort has been done in the case at bar. No portion of the riverside levee has been raised and there is no levee on the east side of the river. Furthermore, in the instant case the fuse plug cannot yet lawfully be created, because to do so would decrease the protection afforded by the levee on the west side of the river in contravention of section 1 of the Flood Control Act. In the *Sponenbarger* case the court held (p. 512) that section 1 did not prohibit the creation of an operative fuse plug prior to the completion of the floodway; because it specifically provided that “nothing herein shall prevent, postpone,

delay, or in anywise interfere with \* \* \* raising, strengthening, and enlarging the levees *on the east side of the river.*" [Italics supplied.]

It is thus clear that the *Sponenbarger* case and the case at bar are quite different. In the former the court was of the opinion that an operative fuse plug had been created, thus exposing the land to the additional risks of flooding contemplated by the Jadwin Plan; in the latter no fuse plug has been created, and the land in question enjoys undiminished flood protection. Only when the fuse plug is created for the Birds Point-New Madrid floodway will there be presented with respect to that floodway the question which the court held was presented with respect to the Boeuf floodway in the *Sponenbarger* case—that is, whether increased susceptibility to flooding constitutes a taking. Therefore, even if this Court should affirm the decision in the *Sponenbarger* case, the decision in this case will not be affected in any way. On the other hand, if this Court should reverse the judgment in the *Sponenbarger* case and hold that there was no taking it follows *a fortiori* that there was no taking in the case at bar.

The mere fact that in the event of a major flood the set-back levee might confine to the floodway waters which might overtop the unreduced riverside levee, and thus increase the depth of the water in the floodway, cannot be made the basis of a taking. *Matthews, Trustee v. United States*, 87 C. Cls. 662, 719

(involving lands in the Birds Point-New Madrid floodway); *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24. No reduction in the height of the riverside levee may or will be made, and no taking will occur, until this proceeding is finally concluded and the Government acquires a flowage easement over petitioner's land by paying the judgment.

The petitioner urges (p. 9) that the decision of the Court of Appeals is in conflict with *Hurley v. Kincaid*, 285 U. S. 95.<sup>7</sup> There Kincaid sought to enjoin work on the Boeuf floodway, contending that since his land had not been condemned he was deprived of his property without just compensation. This Court did not pass on the question of a taking and stated (p. 103) that it had "no occasion to determine any of the controverted issues of fact or any of the propositions of substantive law which have been argued." It held that Kincaid was not entitled to injunctive relief because, even *assuming* his land had been taken, he had an adequate and complete remedy at law by a

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<sup>7</sup> Petitioner also relies (p. 10) upon the decision of the lower courts in the *Kincaid* case, although it was reversed by this Court. The *per curiam* opinion of the Fifth Circuit (49 F. (2d) 768) simply adopts the opinion of the District Court (37 F. (2d) 602) which is not in conflict with the decision in the case at bar. Although the District Court indicated that the appropriation of flowage easements begins when the first levee works are constructed it recognized (p. 608) that the appropriation would not be consummated until the floodway was completed.

suit under the Tucker Act to recover just compensation. The portion of the opinion quoted by petitioner (p. 9) is not a dictum but clearly indicates that the Court was resorting to the familiar practice of assuming the postulate most favorable to the party seeking relief for the purpose of showing that even under such an assumption he was not entitled to it.

Petitioner cites *Jacobs v. United States*, 290 U. S. 13; *United States v. Cröss*, 243 U. S. 316; *United States v. Lynah*, 188 U. S. 445; and *Pumpelly v. Green Bay Company*, 13 Wall. 166, but his own statement of those cases (pp. 9-10) shows that they are not in point. Each involved a flooding and physical invasion of property, which cannot possibly occur in the case at bar until after the fuse-plug section is reduced. The apprehension of a future taking does not, of course, warrant the recovery of compensation. *Peabody v. United States*, 231 U. S. 530; *Matthews v. United States*, 87 C. Cls. 662; *Kirk v. Good*, 13 F. Supp. 1020, 1021 (E. D. Mo.).

Petitioner also intimates (p. 11) that his rights may be affected by the decision in *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6th; certiorari granted, May 15, 1939, No. 27, Oct. Term, 1939). In that case the question is whether a cause of action is stated by a complaint alleging that the United States by erecting a dike extending out into a river from one bank caused the plaintiff's land

on the opposite bank to be washed away. . Plainly the decision in that case, whichever way it goes, will have no bearing on the present case.

#### CONCLUSION

The decision of the Court of Appeals is plainly correct and presents no conflict of decisions. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

/ ROBERT H. JACKSON,  
*Solicitor General.*

NORMAN M. LITTLELL,  
*Assistant Attorney General.*

C. W. LEAPHART,  
*Special Assistant to the Attorney General.*

THOMAS HARRIS,  
C. R. DENNY, JR.,  
*Attorneys.*

SEPTEMBER 1939.

## APPENDIX

### THE MISSISSIPPI RIVER, FLOOD CONTROL ACT

(Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C. Secs. 702a-702m)

AN ACT For the control of floods on the Mississippi River and its tributaries, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: \* \* \* *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side



f the river contiguous to the levee at the head of  
aid floodway, but nothing herein shall prevent,  
ostpone, delay, or in anywise interfere with the  
xecution of that part of the project on the east  
de of the river, including raising, strengthening,  
nd enlarging the levees on the east side of the  
ver. The sum of \$325,000,000 is hereby author-  
ed to be appropriated for this purpose.

\* \* \* \* \*

SEC. 3. Except when authorized by the Secretary  
f War upon the recommendation of the Chief of  
ngineers, no money appropriated under authority  
f this Act shall be expended on the construction  
f any item of the project until the States or levee  
istricts have given assurances satisfactory to the  
ecretary of War that they will (a) maintain all  
ood-control works after their completion, except  
ontrolling and regulating spillway structures, in-  
cluding special relief levees; maintenance includes  
ormally such matters as cutting grass, removal of  
eeds, local drainage, and minor repairs of main  
ver levees; (b) agree to accept land turned over  
o them under the provisions of section 4; (c) pro-  
vide without cost to the United States, all rights  
f way for levee foundations and levees on the  
ain stem of the Mississippi River, between Cape  
irardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest  
pon the United States for any damage from or by  
oods or flood waters at any place: *Provided, how-*  
*ever,* That if in carrying out the purposes of this  
et it shall be found that upon any stretch of the  
anks of the Mississippi River it is impracticable  
o construct levees, either because such construc-



tion is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

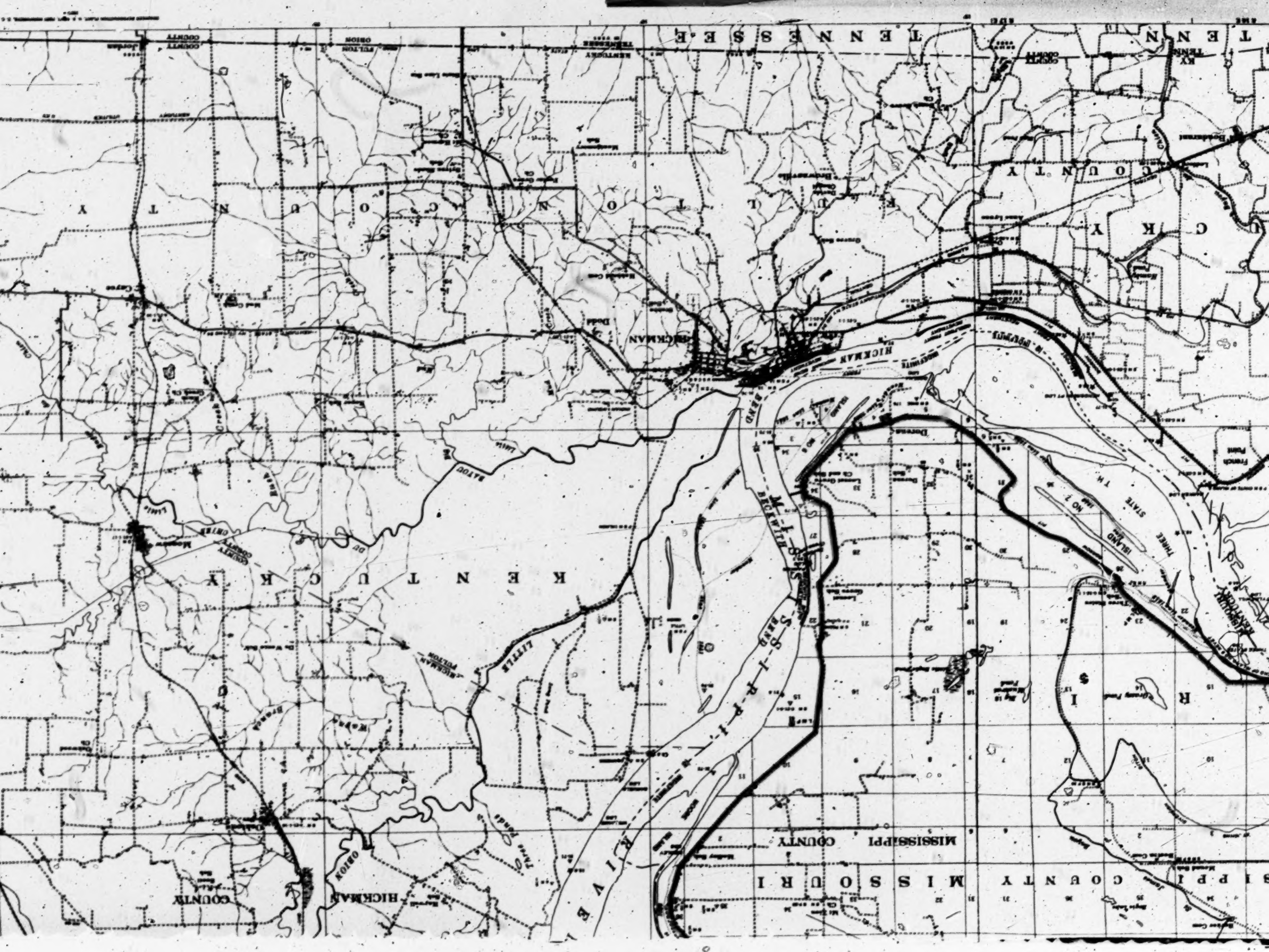
SEC. 4. The United States shall provide flowage rights for additional destructive ~~flood~~ waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of

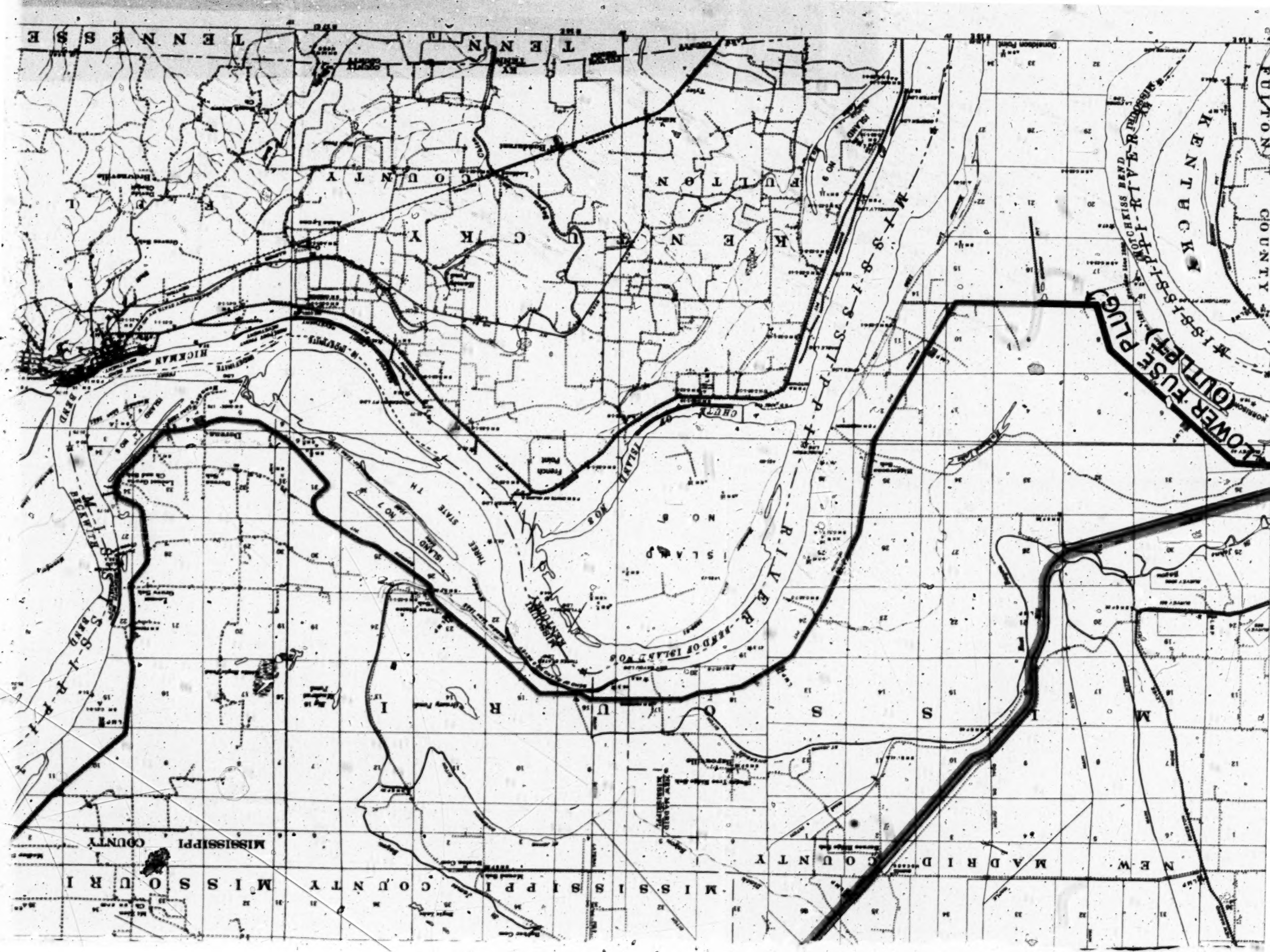
any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

\* \* \* \* \*

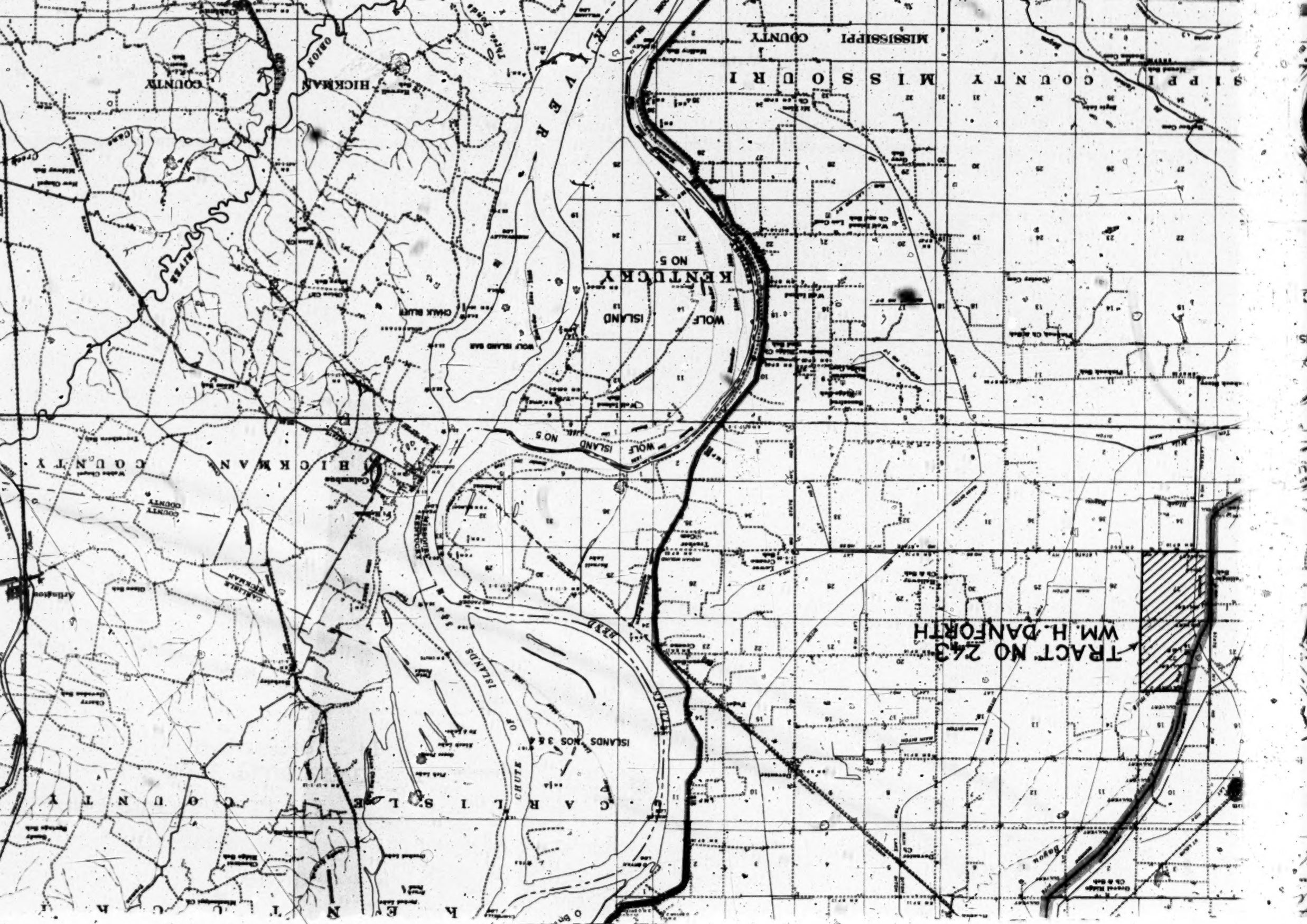
Approved, May 15, 1928.



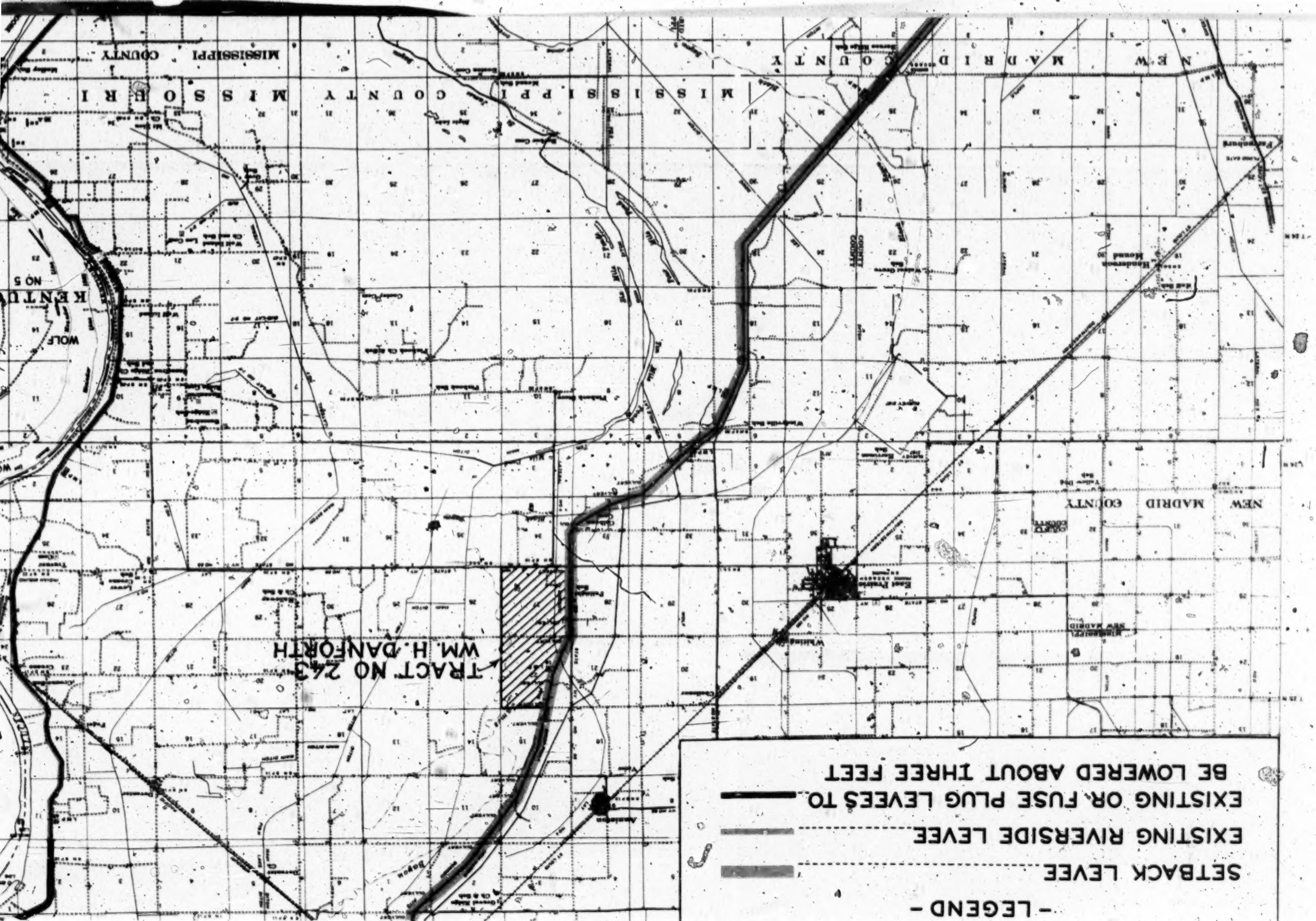










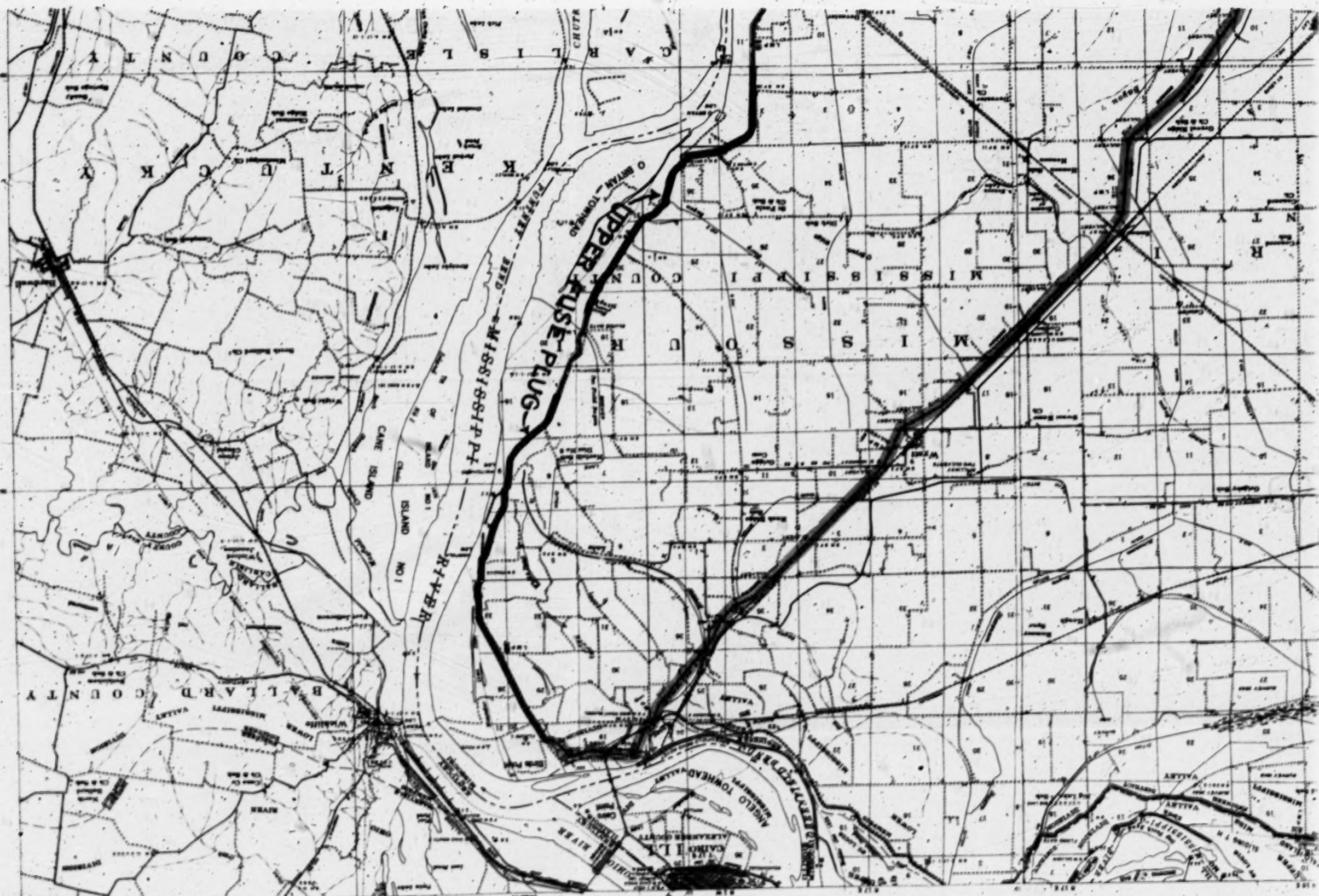


**- LEGEND -**

SETBACK LEVEL

EXISTING RIVERSIDE LEVEL

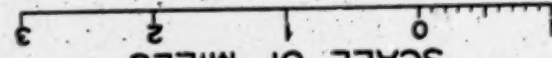
EXISTING OR FUSE PLUG LEVELS TO  
BE LOWERED ABOUT THREE FEET





# BIRDS POINT - NEW MADRID FLOODWAY

SCALE OF MILES



- LEGEND -

- EXISTING OR FUSE PLUG LEVELS TO
- EXISTING RIVERSIDE LEVEL
- SETBACK LEVEL

